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IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

ZELLMER FROMM and MARILYN TUCKER,

Petitioners,

v.

EDWARD J. ROSEWELL, Treasurer and Ex-Officio County Collector of Cook County, Illinois, et al.,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

RESPONDENTS' BRIEF IN OPPOSITION

BEST AVAILABLE COPY

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QUESTION PRESENTED FOR REVIEW

Whether the District Court properly dismissed the petitioners' amended complaint, which was brought under 42 U.S.C. § 1983 for a declaratory judgment, damages and injunctive relief with regard to the assessment and collection of real estate taxes on the petitioners' property.

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OPINION BELOW

The opinion of the United States Court of Appeals for the Seventh Circuit is reported as *Fromm v. Rosewell*, 771 F.2d 1089 (7th Cir. 1985).

STATEMENT OF THE CASE

The petitioners, who own real property in Cook County, Illinois, brought this lawsuit under 42 U.S.C. § 1983. In their suit, they claimed that Illinois procedure denied them constitutional due process in connection with the assessment, levy and collection of taxes on that property. They sought a declaratory judgment, damages and injunctive relief. On motion of the respondents, the District Court dismissed the petitioners' amended complaint. From that order, the petitioners appealed to the United States Court of Appeals for the Seventh Circuit. Originally, the petitioners appealed from the order of dismissal in its entirety. After filing their brief, they voluntarily dismissed their appeal from that part of the District Court's order dismissing count III of their amended complaint. That count sought injunctive relief. They thus chose to limit their appeal to the balance of the District Court's order, namely, the dismissal of count I, which sought a declaratory judgment, and count II, which sought damages. The Court of Appeals affirmed the dismissal.

REASONS FOR DENYING THE PETITION FOR WRIT OF CERTIORARI

THE COURT OF APPEALS FOR THE SEVENTH CIRCUIT PROPERLY AFFIRMED THE DISTRICT COURT'S DISMISSAL OF PETITIONERS' AMENDED COMPLAINT BROUGHT UNDER 42 U.S.C. § 1983 FOR A DECLARATORY JUDGMENT, DAMAGES AND INJUNCTIVE RELIEF WITH REGARD TO THE ASSESSMENT AND COLLECTION OF REAL ESTATE TAXES.

I.

As A Matter Of Law, Illinois Affords Owners Of Real Property Constitutionally Sufficient Procedures For Challenging The Assessment, Levy And Collection Of Taxes On Their Property; Accordingly, Petitioners' Amended Complaint Under 42 U.S.C. § 1983 Seeking An Injunction, A Declaratory Judgment And Damages With Regard To The Assessment And Collection Of Real Estate Taxes Had To Be Dismissed.

The central, crucial issue in this lawsuit is whether Illinois, as a matter of law, provided the petitioners with a plain, speedy and efficient remedy for contesting the assessment, levy and collection of taxes on real estate which they owned in Cook County, Illinois. If so, then the District Court had no choice but to dismiss their instant lawsuit. Indeed, the petitioners, in voluntarily dismissing a portion of their appeal to the Seventh Circuit, in fact conceded the correctness of the District Court's dismissal in so far as their claim for injunctive relief was concerned.

The crux of petitioners' amended complaint was paragraph 3, in which they alleged that they did not have a plain, speedy and efficient remedy for the allegedly wrongful assessment, levy and collection of taxes on real estate

which they owned in Cook County, Illinois. If their allegation in that paragraph was, as a matter of law, untrue, then their amended complaint had to be dismissed. That is, if they in fact did have a plain, speedy and efficient remedy, then 28 U.S.C. § 1341 required dismissal of their claim for injunctive relief, and principles of comity as enunciated in *Great Lakes Dredge & Dock Co. v. Huffman*, 319 U.S. 293, 63 S.Ct. 1070, 87 L.Ed. 1407 (1943), and *Fair Assessment in Real Estate Association v. McNary*, 454 U.S. 100, 102 S.Ct. 177 (1981), required dismissal of their claims for a declaratory judgment and for damages.

In fact, this court itself, in *Rosewell v. LaSalle National Bank*, 450 U.S. 503 (1981), has determined that Illinois, as a matter of law, furnishes to owners of real property in Illinois in general and in Cook County in particular a plain, speedy and efficient remedy against an alleged wrongful assessment, levy or collection of taxes on their property. That remedy, codified in sections 117, 118, 194, and 235 of the Illinois Revenue Act, Ill.Rev.Stat., ch. 120, pars. 598, 599, 675, and 716, requires the property owner contesting his property taxes to pay them under protest, to file a complaint with the Cook County Board of Appeals, and if relief is denied by the Board, to present his objection to the Circuit Court. This court in *Rosewell* declared:

> "There is no doubt that the Illinois state-court refund procedure provides the taxpayer with a 'full hearing and judicial determination' at which [he] may raise any and all constitutional objections to the tax. [citation omitted.] Appeal to the higher Illinois courts is authorized, Ill.Rev.Stat., ch. 120, § 675 (1977), and review is ultimately available in this Court, 28 U.S.C. § 1257." *Id.*, at 514.

Given the existence of such a remedy, the plain language of 28 U.S.C. § 1341 required dismissal of count III of the amended complaint, in which the petitioners sought injunctive relief. That statute provides:

> The district courts shall not enjoin, suspend or restrain the assessment, levy or collection of any tax under State law where a plain, speedy and efficient remedy may be had in the courts of such State.

As for the remaining two counts of the amended complaint, that is, count I, which sought a declaratory judgment, and count II, which sought damages, this court has held that principles of comity likewise demanded dismissal. See *Fair Assessment in Real Estate Association v. McNary*, 454 U.S. 100, 102 S.Ct. 177 (1981); and *Great Lakes Dredge & Dock Co. v. Huffman*, 319 U.S. 293, 63 S.Ct. 1070 (1943). In *Fair Assessment in Real Estate Association*, this court noted that "Congress . . . recognized that the autonomy and fiscal stability of the States survive best when state tax systems are not subject to scrutiny in federal courts." *Id.*, at 63 S.Ct. at 179. The court continued, "This legislation [28 U.S.C. § 1341], and the decisions of this Court which preceded it, reflect the fundamental principle of comity that is essential to 'Our Federalism,' particularly in the area of state taxation. Even after enactment of § 1341 it was upon this comity that we relied in holding that federal courts, in exercising the discretion that attends requests for equitable relief, may not even render declaratory judgments as to the constitutionality of state tax laws." *Id.*, at 179 (citations omitted). This court then went on to hold the principle of comity, besides prohibiting an action for a declaratory judgment, also bars federal courts from granting damages in state tax cases. *Id.*, at 181.

In summary, the Congress and this court are absolutely clear that all three counts of petitioners' amended complaint—for declaratory judgment, damages and injunctive relief—had to be dismissed in view of the determination by this court itself that Illinois provides owners of real property such as petitioners with a plain, speedy and efficient remedy for challenging the assessment, levy and collection of taxes on their property.

II.

The Narrow Facet Of Illinois Tax Procedure That Is The Subject Of The Petitioners' Lawsuit, Namely, The Procedure Regarding "Certificates of Error," Has Been Upheld As Constitutionally Sufficient By The Supreme Court Of The United States, The Supreme Court Of Illinois, And The United States Court Of Appeals For The Seventh Circuit.

The petitioners' lawsuit, although asserting disingenuously and in contradiction of this court that Illinois law unconstitutionally denies them a plain, speedy and efficient remedy against improper real estate taxation, in fact deals with a narrow facet of Illinois real estate tax procedure, namely, the procedure regarding "certificates of error." This procedure is codified in section 123 of the Illinois Revenue Act, Ill.Rev.Stat., ch. 120, par. 604. With regard to the certificate of error procedure, Illinois law is clear that taxpayers such as the petitioners lack standing. In *Chicago Sheraton Corp. v. Zaban*, 71 Ill.2d 85 (1978), the Illinois Supreme Court stated: "We are of the opinion that the General Assembly intended the certificate of error procedure to be an expeditious summary process, *without participation by the taxpayer*, for correcting the assessor's errors. * * * We hold that section 123 [Ill.Rev. Stat., ch. 120, par. 604] did not require the board of appeals to hold a hearing concerning the certificate of error and plaintiff had neither a statutory nor constitutional

right to participate in the certificate of error proceeding or to challenge any alleged irregularities in that proceeding." *Id.*, at 91-92 (emphasis supplied). The Illinois court declared this procedure to be separate and distinct from the tax objection procedure in which the taxpayer does have standing to challenge the assessment and collection of taxes on his real property, Ill.Rev.Stat. 1983, ch. 120, pars. 675 and 716. That procedure, as we have already demonstrated above, has been specifically held by this court to satisfy constitutional requirements of due process.

The petitioners, in paragraph 21 of their amended complaint, in fact acknowledged that they understood that tax objection procedure. One therefore infers that they deliberately chose not to follow it. Yet they seek to evade the consequences of their failure by attempting to use a procedure designed simply to give the assessor himself an expeditious summary process for correcting his errors in assessment. Since the petitioners did have a constitutionally adequate remedy to protest the assessment and collection of taxes on their real property, they cannot legitimately complain that they suffered a deprivation of their due process rights because they were not allowed to participate in the certificate of error procedure. Indeed, if the Illinois General Assembly were to eliminate the entire certificate of error procedure, the petitioners' constitutional rights would be unaffected, for they would still have the remedy set forth in sections 117, 118, 194, and 235 of the Illinois Revenue Act, Ill.Rev.Stat. 1983, ch. 120, pars. 598, 599, 675, and 716, a remedy specifically held constitutional by this court, a remedy completely separate and distinct from the certificate of error procedure.

As to the certificate of error procedure itself, this court has determined that that procedure is constitutionally sufficient. This court did so when it dismissed, for want of

a substantial federal question, the appeal from the aforementioned decision of the Illinois Supreme Court in *Chicago Sheraton Corporation v. Zaban, supra,* 439 U.S. 888, 99 S.Ct. 242 (1978). Under the doctrine enunciated in *Hicks v. Miranda,* 422 U.S. 332, 95 S.Ct. 2281 (1974), that dismissal by this court was in fact an adjudication of the constitutional claim presented in the case. See also *Chicago Sheraton Corporation v. Zaban,* 593 F.2d 808 (7th Cir. 1979).

The Illinois Supreme Court decision in *Chicago Sheraton Corporation v. Zaban* that was affirmed by this court is substantially on all fours with the instant case. In *Zaban,* as here, the plaintiff's property was the subject of an assessor's certificate of error forwarded to the Board of Appeals; there, as here, but after an even longer delay, the Board of Appeals refused, allegedly without notice to the taxpayer, to endorse the certificate, thereby ensuring its denial by the Circuit Court; there, as here, plaintiffs failed to perfect or pursue their available remedy—the taxpayer's specific objection under Ill.Rev.Stat. 1983, ch. 120, pars. 675 and 716.

In summary, this court, as well as the Illinois Supreme Court, have already determined that the certificate of error procedure does not deprive an Illinois property owner of constitutional due process. Since the gravamen of the petitioners' amended complaint was precisely that the procedure itself caused them such a constitutional deprivation, the District Court, in view of the aforementioned decisions, had no choice but to dismiss petitioners' lawsuit, and the Court of Appeals had no choice but to affirm that dismissal. For the same reasons, the present petition for a writ of certiorari should not be granted.

CONCLUSION

It is respectfully submitted that petitioners have wholly failed to sustain their burden of establishing under Rule 17 that there are special and important reasons why the writ should be granted. The decision below did not involve an important question of federal law which has not been settled by this court; nor has the Court of Appeals decided a federal question in a way to conflict with applicable decisions of this court or of another Court of Appeals on the same matter. The Court of Appeals correctly affirmed the dismissal by the District Court of the petitioners' amended complaint. The writ should not be granted.

Respectfully submitted,

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